No. 87-1372

In the Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC, PETITIONER

v.

AMERADA HESS SHIPPING CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether a federal district court has jurisdiction under the Alien Tort Statute, 28 U.S.C. 1350, over a suit brought by a foreign corporation against a foreign state for a tort allegedly committed on the high seas in violation of international law, where the foreign state is immune from the jurisdiction of the courts of the United States under the Foreign Sovereign Immunities Act of 1976 (FSIA).

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INTEREST OF THE UNITED STATES

This case presents an important question regarding the scope of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602-1611. The FSIA prescribes the exclusive bases for asserting jurisdiction over a foreign state in the courts of the United States, consistent with what the Executive Branch and Congress found to be the prevailing and appropriate principles of international law and practice. The court of appeals' held in this case that the courts of the United States are open to tort suits by aliens (but not United States citizens) who seek damages for alleged violations of international law by foreign governments, even where the act or omission occurred outside the United States. That holding is inconsistent with the FSIA and international law, and it exposes the United States to reciprocal action by the courts of other Nations. For these reasons, this case implicates the foreign relations of the United States.

STATEMENT

1. Respondent United Carriers, Inc., a Liberian corporation, was the owner of a crude oil tanker named the Hercules. Respondent Amerada Hess Shipping Corporation, also a Liberian corporation, had chartered the Hercules to transport crude oil from Valdez, Alaska, around the southern tip of South America, to an oil refinery in the Virgin Islands. On May 25, 1982, the Hercules began a return voyage, without cargo, from the Virgin Islands to Valdez. At that time, Great Britain and Argentina were at war over the Falkland (Malvinas) Islands. On June 8, 1982, while the Hercules was on the high seas in the South Atlantic, and allegedly outside the "war zones" designated by Argentina and Great Britain,[1] it was attacked by Argentine military aircraft. The decks and hull of the ship were damaged, and an undetonated bomb lodged in her starboard side. Respondent United Carriers decided that it would be too dangerous to attempt to remove the undetonated bomb, and the ship therefore was scuttled off the coast of Brazil. Pet. App. 3a 4a, 27a-28a.

2. Respondents filed suit in the United States District Court for the Southern District of New York seeking money damages from petitioner Argentine Republic for the injuries they sustained as a result of the attack.[2] Respondents alleged that petitioner's attack on the neutral vessel violated established norms of international law, and they invoked the jurisdiction of the district court under the Alien Tort Statute, 28 U.S.C. 1350, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." Pet. App. 28a, 36a, 38a, 39a, 41a.

[1] Our recitation of the district court's reference to "war zones" should not be understood as an endorsement of the view that a Nation has the unfettered right under international law to designate any area of the high seas as such a zone, into which a neutral ship enters only at its own risk. See R. Tucker, *The Law of War and Neutrality at Sea* 156 n.16, 301-303 (Naval War College 1955); International Military Tribunal, Nuremberg, *In Trial of Admiral Doenitz*, reprinted in W. Bishop, *International Law, Cases and Materials* 810-812 (1962).

[2] Respondent United Carriers sought $10 million in damages for the loss of the ship, and respondent Amerada Hess sought $1.9 million in damages for the loss of fuel that went down with the ship (Pet. App. 4a).

The district court dismissed the complaint, holding that respondents' suits are barred by the Foreign Sovereign Immunities Act of 1976 (FSIA).[3] See Pet. App. 25a-35a. In enacting the FSIA, Congress rejected the rule of absolute immunity for foreign sovereigns that had been recognized since the earliest days of the Nation (see *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812)), and instead codified the "restrictive" theory of sovereign immunity that was followed by many other Nations and had been adopted by the Executive Branch in 1952 in the so-called Tate Letter. Under that theory, a foreign state is immune from suit based on its sovereign or public acts, but not its commercial or private acts. 28 U.S.C. 1602; see *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983); H.R. Rep. 94-1487, 94th Cong., 2d Sess. 8-9, 14 (1976); S. Rep. 94-1310, 94th Cong., 2d Sess. 9, 10 (1976).

In the district court's view, Congress was "emphatic" in its purpose that "the FSIA be the sole means of assessing claims of immunity" by a foreign state (Pet. App. 29a). The court found this congressional purpose "apparent" from the text of the Act, which provides that " 'a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter' " (*ibid.* (quoting 28 U.S.C. 1604)), and from the legislative history (Pet. App. 29a). The court concluded that "[respondents'] claims undeniably fall outside of the exceptions to blanket foreign sovereign immunity provided by the FSIA" (*id.* at 30a), because in order for a foreign state to be denied immunity from a suit sounding in tort, the FSIA "requires that the 'damage to or loss of property' occur 'in the United States' " (*ibid.*, quoting 28 U.S.C. 1605(a)(5)); yet in this case, respondents "can claim no loss whatsoever occurring in the United States" (Pet. App. 30a).

The district court also rejected respondents' contention that the Alien Tort Statute "provides the basis for jurisdiction that

[3] Pub. L. No. 94-583, 90 Stat. 2891, codified at 28 U.S.C. 1330, 1391(f), 1441(d) and 1602-1611.

the FSIA denies" (Pet. App. 31a). The court noted that "[n]o case law supports the assertion that a foreign sovereign state would not have enjoyed immunity in 1789," when the Alien Tort Statute was enacted (*id.* at 31a-32a). But the court held that even if a foreign sovereign at one time might have been sued under the Alien Tort Statute, the FSIA now confers immunity on a foreign state unless the suit falls within one of the exceptions to immunity specified in the FSIA itself (*ibid.*).

3. a. A divided panel of the court of appeals reversed and remanded (Pet. App. 1a-21a). The court of appeals held that the district court has jurisdiction under the Alien Tort Statute (*id.* at 7a-10a), because the suit is brought by aliens (the respondent Liberian corporations), it sounds in tort ("the bombing of a ship without justification"), and it alleges a violation of international law ("attacking a neutral ship in international waters, without proper cause for suspicion or investigation" [4]) (*id.* at 7a-8a).

[4] In finding that the alleged attack violated international law (see Pet. App. 5a-7a), the court of appeals relied, inter alia, on the Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, and the 1982 United Nations Convention on the Law of the Sea (Pet. App. 6a). Although the 1958 Convention codifies such long-recognized customary principles as the freedom of navigation on the high seas, it is oriented toward peacetime. So, too, is the 1982 Convention, which the United States has not signed and is not yet in force, but which the United States considers reflective of customary international law in its navigational provisions. While peacetime concepts and principles do not become wholly irrelevant in time of war, neither the 1958 nor the 1982 Convention was negotiated with a view toward wartime, and they do not in fact address the separate, specialized body of rules on the use of force at sea in time of war. (We have been informed by the Department of State that any contrary inference regarding the content of the 1958 Convention that might be drawn from the United States' brief as amicus curiae in the court of appeals (at 10 n.5) is due to the inadvertent omission of the word "respectively" at the end of the first line of that note.) Sources of international law that are more relevant to the use of military force in time of war are addressed at note 27, *infra*. For examples of the distinction between the bodies of international law of the sea that govern peacetime and those that govern wartime, see C. Colombos, *The International Law of the Sea* (6th rev. ed. 1967), which is divided into Part I (The International Law of the Sea in Time of Peace) and Part II (The International Law of the Sea in Time of War), and Naval Warfare Publication 9, *The Commander's Handbook on the Law of Naval Operations* (1987), which is similarly divided into Part I (Law of Peacetime Naval Operations) and Part II (Law of Naval Warfare).

The court acknowledged petitioner's submission that the Alien Tort Statute provides jurisdiction only over suits against individuals, not sovereign states, since the United States recognized absolute immunity for foreign states when the Statute was enacted in Section 9 of the Judiciary Act of 1789, ch. 20, 1 Stat. 77. But the court found it unnecessary to decide whether a court could have exercised jurisdiction over this case in 1789. In the court's view, the Alien Tort Statute "is no more than a jurisdictional grant based on international law," and "[i]n construing the Alien Tort Statute, 'courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today' " (Pet. App. 8a-9a, quoting *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)). Accordingly, the court concluded that it "must look to modern international law to decide whether the statute provides jurisdiction over a foreign sovereign" (Pet. App. 9a). Citing two law review articles, the court believed that under the "modern view," sovereign states should not be accorded immunity from suit for their violations of international law (*ibid.*).

The court rejected Argentina's contention that, regardless of whether the Alien Tort Statute once might have provided a basis for jurisdiction in a case such as this, the FSIA is now the exclusive basis for obtaining jurisdiction over foreign sovereigns (Pet. App. 10a-13a). The court acknowledged the force of the legislative history stating that the FSIA " 'sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity' " (*id.* at 11a, quoting H.R. Rep. 94-1487, 94th Cong., 2d Sess. 12 (1976)), the Second Circuit's own prior conclusion that the FSIA " 'insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act' " (Pet. App. 11a, quoting *O'Connell Machinery Co.* v. *M.V. "Americana"*, 734 F.2d 115, 116 (2d Cir.), cert. denied, 469 U.S. 1086 (1984)), and this Court's "similar views" in *Verlinden* (Pet. App. 11a, citing 461 U.S. at 496-497). But the court chose not to follow those pronouncements here, because it believed that "Congress was not focusing on violations of international law when it enacted the FSIA" and therefore "did not intend to remove existing remedies in

United States courts [under the Alien Tort Statute] for violations of international law of the kind presented here" (Pet. App. 11a).[5]

b. Judge Kearse dissented (Pet. App. 18a-21a). Judge Kearse expressed skepticism that the Alien Tort Statute was "intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of 'evolving standards of international law' " (*id.* at 19a). But however that may be, she concluded that the majority had improperly disregarded the "clearly restrictive provisions" of the FSIA, which were " 'intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns' " (*ibid.* (quoting H.R. Rep. 94-1487, at 12)).

SUMMARY OF ARGUMENT

A. The Foreign Sovereign Immunities Act of 1976 constitutes the exclusive basis for asserting jurisdiction over a foreign state and for determining whether it is immune from suit. This purpose is manifest in 28 U.S.C. 1602, which states that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [28 U.S.C. 1602-1611]"; in 28 U.S.C. 1604, which mandates that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter"; and in 28 U.S.C. 1330, which confers subject matter and personal jurisdiction on the district courts in suits against a "foreign state" only when the state is not entitled to immunity under 28 U.S.C. 1605-1607. None of the exceptions to immunity in Sections 1605-1607 applies here. The sole exception for suits sounding in tort, 28 U.S.C. 1605(a)(5), dispenses with immunity only for certain torts that occurred in the United States. Because the alleged attack by petitioner's military forces occurred outside the United States, that exception is inapplicable and petitioner is "immune from the jurisdiction of the courts of the United States" (28 U.S.C. 1604), including any jurisdiction conferred by the Alien Tort Statute, 28 U.S.C. 1350.

[5] The court also held that the actions of Argentina alleged by respondents were "sufficiently related" to the United States to fall within constitutional limitations on the exercise of personal jurisdiction over a foreign defendant (Pet. App. 14a-15a).

B. The legislative history confirms that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states"; that "Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states"; and that the FSIA "is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns." H.R. Rep. 94-1487, at 12-13; S. Rep. 94-1310, at 11-12. This Court, in *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480 (1983), and the courts of appeals also have uniformly taken the view that the FSIA is the exclusive basis for resolving questions of jurisdiction and immunity in suits against a foreign state. In addition, the legislative history of the tort exception in Section 1605(a)(5) confirms that Congress intended to permit suits against a foreign state only for certain torts that occur in the United States. There is no indication that Congress intended the exception to apply to an attack by a foreign state's military forces on the high seas in time of war.

C. The court of appeals' rationale for finding jurisdiction over this suit under the Alien Tort Statute, outside the comprehensive framework of the FSIA, is seriously flawed. First, even if there once was a plausible basis for a suit such as this under the Alien Tort Statute prior to 1976 (which there was not), the text and legislative history of the FSIA make clear that it now prescribes the exclusive standards for exercising jurisdiction and determining claims of immunity in suits against foreign states. Second, the court of appeals was mistaken in its premise that Congress was not focusing on violations of international law when it enacted the FSIA (and that the FSIA therefore should not be construed to preclude the hypothetical "existing remedies" for such violations under the Alien Tort Statute): The FSIA contains an exception to the rule of immunity for certain cases involving property taken "in violation of international

law" (28 U.S.C. 1605(a)(3)), and Congress expressly rested the FSIA in part on its constitutional power to define offenses against the "Law of Nations" (U.S. Const. Art. I, § 8, Cl. 10). Third, to permit this suit to proceed would substantially depart from accepted principles of international law and thereby adversely affect the foreign relations of the United States and expose the United States to reciprocal action in other countries. Fourth, there is in any event no basis for the court of appeals' premise that the Alien Tort Statute was intended to provide a basis for a suit against a foreign sovereign in circumstances such as these prior to 1976, because foreign states enjoyed absolute immunity from the time the Alien Tort Statute was enacted in 1789 until 1952, and even after that time they would have been immune from suit based on a military attack on the high seas.

ARGUMENT

RESPONDENTS' SUITS ARE BARRED BY THE FOREIGN SOVEREIGN IMMUNITIES ACT, WHICH PRESCRIBES THE EXCLUSIVE GROUNDS FOR JURISDICTION AND RULES OF IMMUNITY IN SUITS AGAINST A FOREIGN STATE

The text, legislative history and consistent judicial interpretation of the FSIA make clear that it prescribes the exclusive standards for asserting jurisdiction over a foreign state and for determining when a foreign state is immune from suit in United States courts. The FSIA lifts a foreign state's immunity to suits sounding in tort only if they are based on certain acts or omissions occurring in the United States. The court of appeals' holding that the respondent Liberian corporations may invoke the jurisdiction of the United States courts to sue petitioner Argentine Republic for injuries allegedly sustained by their ship as a result of an attack by petitioner's military forces on the high seas in time of war constitutes a radical departure from the rules of sovereign immunity that are prescribed by the FSIA and international law. The proper way for respondents to seek compensation from petitioner is by requesting espousal of their claims by the Government of Liberia through diplomatic channels – the traditional avenue for resolving such claims.

A. THE TEXT AND STRUCTURE OF THE FSIA ESTABLISH THAT IT COMPREHENSIVELY GOVERNS QUESTIONS OF IMMUNITY AND JURISDICTION IN SUITS AGAINST FOREIGN STATES AND UNAMBIGUOUSLY BARS RESPONDENTS' SUITS

"It is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, No. 86-473 (Dec. 1, 1987), slip op. 5 (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). That principle has particular force in this case, because the FSIA, as a statute whose purpose is "to prescribe and regulate a portion of the jurisdiction of the federal courts[,] * * * must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968); see also *Heckler* v. *Edwards*, 465 U.S. 870, 877 (1984). As we shall explain, the text and structure of the FSIA unambiguously foreclose this suit.

1. Section 4(a) of the FSIA added a new Chapter 97 to Title 28 of the United States Code, 28 U.S.C. 1602-1611, which is entitled the "Jurisdictional Immunities of Foreign States." The very fact that Congress devoted an entire chapter of the United States Code to this relatively narrow subject is weighty evidence that Congress did not intend to permit the courts to fashion rules of immunity in a common-law manner by relying on statutory provisions outside of Chapter 97 (such as the Alien Tort Statute) that are not even concerned with the jurisdictional immunities of foreign states. But Congress did not leave this preclusion to inference. In the first section of Chapter 97, which sets forth Congress's findings and declaration of purpose in enacting the FSIA, Congress expressed its determination that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. 1602.

Consistent with this determination, Section 1604 establishes a universal rule that all foreign states are entitled to sovereign

immunity in the United States in all circumstances, save only as exceptions to that rule are set forth in the FSIA itself.[6] Section 1604 provides that "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of this Act[,] a foreign state *shall be immune from the jurisdiction of the courts of the United States* and of the States *except as provided in sections 1605 to 1607 of this chapter*" (emphasis added). Section 1605 in turn specifies in detail the exceptions to this general rule of immunity, which apply to discrete categories of cases involving waivers of immunity, commercial activities, property in the United States, certain torts occurring in the United States, and maritime liens; Section 1606 prescribes the extent of a foreign state's liability when it is not entitled to immunity; and Section 1607 permits certain counterclaims against a foreign state.[7]

[6] The term "foreign state" is defined (except as used in Section 1608) to include a political subdivision and an agency or instrumentality of the state (28 U.S.C. 1603(a) and (b)).

[7] Section 1604 provides that the general rule of immunity it prescribes is "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of [the FSIA] * * *." This exception has no relevance here. It applies only if the international agreement addresses amenability to suit and directly conflicts with the immunity provisions of the FSIA (H.R. Rep. 94-1487, at 10, 17-18; S. Rep. 94-1310, at 6, 17). Respondents cite (Br. in Opp. 2-3) Articles 5 and 7 of the Geneva Convention on the High Seas, Apr. 29, 1958 (see note 4, *supra*) and Articles I and IV of the Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1990, 1991. However, those Conventions merely establish certain substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not purport to create a private right of action to recover compensation, and thus are not self-executing in this respect (cf. *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *Head Money Cases*, 112 U.S. 580, 598-599 (1884)), and they do not address the question of one sovereign state's immunity to the jurisdiction of the courts of another sovereign state. Moreover, although the United States is a party to both conventions, Argentina is merely a signatory. Section 1604 was not intended to dispense with the immunity of a foreign state based on an "agreement" to which it is not a party. Respondents also err in relying (Br. in Opp. 3-4) on Article I of the Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States-Liberia, 54 Stat. 1740, which, inter alia, provides that the nationals of each party "shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws * * *." There is no violation of that treaty by the United States here, because the FSIA is one of the "local laws" to which respondents must conform in bringing suit.

Sections 1604 to 1607 thus prescribe what Section 1602 presages: a comprehensive, self-contained statutory scheme for determining when a foreign state is entitled to sovereign immunity. Compare *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 4-8, 14. If none of the exceptions in Sections 1605 to 1607 is applicable, then the "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" (28 U.S.C. 1604). This language is unequivocal. Cf. *Honig* v. *Doe*, No. 86-728 (Jan. 20, 1988), slip op. 16. Accordingly, if a plaintiff attempts to invoke the jurisdiction of a federal district court under the Alien Tort Statute (or any other jurisdictional provision) in order to sue a foreign state, Section 1604 expressly renders the foreign state "immune" from that "jurisdiction" unless one of the exceptions in the FSIA itself applies.

It is clear in this case that 28 U.S.C. 1604 renders petitioner Argentine Republic immune from the jurisdiction of the district court, because, as that court held (Pet. App. 30a-31a), none of the exceptions to the general rule of immunity applies. There is only one exception in the FSIA that permits suits sounding in tort, and that exception is limited to actions "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property *occurring in the United States* and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment" (28 U.S.C. 1605(a)(5) (emphasis added)). As the courts construing Section 1605(a)(5) have consistently recognized,[8] the legislative history

[8] See *Gulf Arab Media-Arab American Film Co.* v. *Faisal Foundation*, 811 F.2d 1260, 1261, amended, 832 F.2d 132 (9th Cir. 1987); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985); *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1524-1525 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985); *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 842-843 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984); cf.

makes clear that in order for this exception to apply, the negligent or wrongful act or omission that caused the injury, as well as the injury itself, must have occurred in the United States. See *Verlinden*, 461 U.S. at 488 n.11 (referring to 28 U.S.C. 1605(a)(5) as providing an exception "for certain non-commercial torts within the United States").[9] In no instance could the tort exception to immunity apply where both the act or omission and the injury occurred outside the United States. Section 1605(a)(5) therefore has no application here, because the alleged attack upon and injury to respondents' ship occurred outside the United States – on the high seas, in the South Atlantic.

Olsen v. *Government of Mexico*, 729 F.2d 641, 645-646 (9th Cir.), cert. denied, 469 U.S. 917 (1984); *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582, 588-590 & n.10 (9th Cir. 1983), cert. denied, 469 U.S. 880 (1984).

[9] The committee reports state that the tort exception applies only if the act or omission of the foreign state or its officer or employee "occur[red] within the jurisdiction of the United States" (H.R. Rep. 94-1487, at 21; S. Rep. 94-1310, at 20). That also was the contemporaneous view of the responsible Executive Branch officials, who were instrumental in drafting the FSIA. See *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 34 (1973) [hereinafter *1973 Hearing*] (letter from the Attorney General and the Secretary of State) (the exception permits suits for injuries "occasioned by the tortious act in the United States of a foreign state"); *id.* at 42 (the exception applies if the "negligent or wrongful act • • • took place in the United States"); *id.* at 21 (statement of acting Legal Adviser Brower) (same); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 27 (1976) [hereinafter *1976 Hearings*] (remarks of Legal Adviser Leigh) (exception for "torts that occur in the United States").

This interpretation is also consistent with the parallel exception in the European Convention on State Immunity, which entered into force on June 11, 1976, while Congress was considering the FSIA, and which was regarded as generally consistent with the FSIA. See *1976 Hearings* 37. Article 11 of that Convention provides that a contracting state shall not be immune to actions seeking redress for injury to the person or damage to tangible property "if the facts which occasioned the injury or damage occurred in the territory of the State of the forum" (U.N. Leg. Series, *Materials on Jurisdictional Immunities of States and Their Property* 159 (1982)).

Moreover, the FSIA excludes from the tort exception "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." 28 U.S.C. 1605(a)(5)(A). This exclusion has been described as preserving a foreign state's immunity for "acts or omissions of a fundamentally governmental nature." *Olsen* v. *Government of Mexico*, 729 F2d 641, 645 (9th Cir. 1984); see also *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 921-923 & n.4 (D.C. Cir. 1987); *Joseph* v. *Office of Consulate General of Nigeria*, 830 F.2d 1018, 1026-1027 (9th Cir. 1987). It may be difficult in some circumstances to locate the precise dividing line between the kinds of torts for which a foreign state is not entitled to immunity under Section 1605(a)(5) and the acts of a foreign state for which sovereign immunity is preserved by Section 1605(a)(5)(A). In this case, however, we think it clear that an attack by the military forces of one foreign state on a ship registered under the laws of another foreign state that occurred on the high seas in time of war should be regarded by a court of the United States as "discretionary" and of a "fundamentally governmental nature" for purposes of 28 U.S.C. 1605(a)(5)(A). See also pages 18-20, *infra*.

For the foregoing reasons, petitioner is "immune from the jurisdiction of the courts of the United States and of the States" with regard to claims based upon the alleged attack by petitioner's military forces on respondents' ship. 28 U.S.C. 1604.

2. The conclusion that the FSIA is exclusive and that a plaintiff cannot circumvent its carefully drawn limitations by bringing a suit under another jurisdictional statute (such as the Alien Tort Statute) also is evident from the special grant of subject matter jurisdiction in 28 U.S.C. 1330. That provision was added to the Judicial Code by Section 2(a) of the FSIA and is entitled "Actions against foreign states." Section 1330(a) provides that "[t]he district courts shall have original jurisdiction without regard to amount in controversy of *any* nonjury civil action against a foreign state • • • as to *any* claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or

under any applicable international agreement" (emphasis added). Congress's intention to address the question of jurisdiction over suits against foreign states in a comprehensive manner is evident from the fact that Section 1330 draws within the ambit of its concern "any" action against a foreign state with respect to "any" claim for relief, but only permits the district courts to exercise jurisdiction over such actions and claims if the foreign state is not entitled to immunity under 28 U.S.C. 1605-1607.[10]

Indeed, precisely because of the all-encompassing scope of the new 28 U.S.C. 1330(a) as regards cases in which a foreign state is a *defendant*, Section 3 of the FSIA amended the diversity statute to delete the references to suits to which a "foreign state" is a party (as either a plaintiff or defendant) (see 28 U.S.C. (1970 ed.) 1332(a)(2) and (3)) and added a new paragraph (4) that preserves a distinct head of diversity jurisdiction over suits involving a foreign state only where it is the *plaintiff* (90 Stat. 2891; see 28 U.S.C. 1332(a)(4)). As the House Report explained, "[s]ince jurisdiction in actions *against* foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous" (H.R. Rep. 94-1487, at 14 (emphasis added); accord, S. Rep. 94-1310, at 13 (emphasis added)). There is no reason to believe that Congress intended Section 1330 to be any less "comprehensive[]" in cases involving an alleged violation of the law of nations, or that the Alien Tort Statue would be any less "superfluous" than the diversity statute in those circumstances. Moreover, as a result of the deletion of the references to a "foreign state" in 28 U.S.C. (1970 ed.) 1332(a)(2) and (3), it is clear that a federal court would not have diversity jurisdiction over a suit by a United States citizen against a foreign state based on the attack alleged in this case. It is implausible to suppose that Congress nevertheless intended to permit an alien to bring such a suit under 28 U.S.C. 1350, despite the more attenuated nexus of the suit to the United States.

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[10] Although the FSIA contemplates that a suit may be brought against a foreign sovereign in state court, the FSIA guarantees the defendant the right to remove the suit to federal court (28 U.S.C. 1441(d); see *Verlinden*, 461 U.S. at 489).

Sections 1330(a) and 1604 therefore are complementary: Section 1330(a) confers jurisdiction on the district courts whenever the foreign state is *not* entitled to immunity, and Section 1604 bars the district courts from exercising jurisdiction wherever the foreign state *is* entitled to immunity. In this manner, the two provisions occupy the entire fields of foreign sovereign immunity and subject matter jurisdiction over suits against foreign states.[11] There is no room in this framework for a court to fashion its own standards of foreign sovereign immunity that depart from those in the FSIA or to exercise subject matter jurisdiction in a suit against a foreign state where jurisdiction does not lie under 28 U.S.C. 1330(a). Accordingly, " '[t]he plain meaning of the statute decides the issue presented' " (*FERC* v. *Martin Exploration Management Co.*, No. 87-363 (May 31, 1988), slip op. 3 (quoting *Bethesda Hospital Ass'n* v. *Bowen*, No. 86-1764 (Apr. 4, 1988), slip op. 4)) and requires dismissal of respondents' suits.

B. THE LEGISLATIVE HISTORY AND CONSISTENT JUDICIAL INTERPRETATION OF THE FSIA STRONGLY REINFORCE THE PLAIN MEANING OF ITS TEXT AND STRUCTURE

1. a. The legislative history of the FSIA overwhelmingly supports the bar to suit that is mandated by the text and structure of the Act. The House and Senate Reports both stress that the FSIA "sets forth the *sole and exclusive standards* to be used

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[11] Subsection (b) of 28 U.S.C. 1330 provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction under subsection (a) where service has been made under [28 U.S.C. 1608]." Thus, personal jurisdiction, like subject matter jurisdiction, exists only if one of the exceptions to foreign sovereign immunity in Sections 1605-1607 is applicable (*Verlinden*, 461 U.S. at 485, 489 & n.14). Enforcement of these statutory limitations would render it unnecessary to address petitioner's other objections (Br. 34-48) to the exercise of personal jurisdiction in this case. See H.R. Rep. 94-1487, at 13. This meticulous attention to questions of personal jurisdiction and service of process, as well as venue (28 U.S.C. 1391(f)), removal (28 U.S.C. 1441(d)), and attachment and execution (28 U.S.C. 1609-1611), underscores Congress's intention to enact a comprehensive statutory scheme.

in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States" (H.R. Rep. 94-1487, at 12 (emphasis added); S. Rep. 94-1310, at 11 (emphasis added)). Both Reports also stress that "Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states," which is essential because disparate treatment "may have adverse foreign relations consequences" (H.R. Rep. 94-1487, at 12-13; S. Rep. 94-1310, at 12).[12]

Consistent with this "exclusive" and "comprehensive" scope Congress intended for the FSIA, the Reports make clear that the FSIA "is intended to preempt any *other* State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities" (H.R. Rep. 94-1487, at 12 (emphasis added); S. Rep. 94-1310, at 11 (emphasis added)). Thus, even if we assume that the reference to the "law of nations" in the Alien Tort Statute might once have been a source of authority for a court to draw on its own assessment of international law in order to determine whether a foreign state should be accorded immunity to a suit under that Statute, the legislative history confirms that Congress "intended [the FSIA]

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[12] The contemporaneous interpretation and implementation of the FSIA by the Department of State also reflects the view that its provisions are exclusive. As required by the section of the FSIA governing service of process, 28 U.S.C. 1608(a), the Department of State promulgated regulations in 1977 (42 Fed. Reg. 6367), which are still in effect (22 C.F.R. Pt. 93), to define the content of the notice of suit that the plaintiff must serve on the foreign state under the Act. Paragraph nine of the required notice states:

> Questions relating to state immunities and to the jurisdiction of the United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611 of Title 28, United States Code (Pub. L. No. 94-583; 90 Stat. 2891).

Respondents included the quoted paragraph in their notices of suit in this case, but then attempted to qualify it by asserting that "the Foreign Sovereign Immunities Act of 1976 is inapplicable to the action described herein, which arises under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1982)" (Pet. App. 38a, 41a). Petitioners thus sought to take advantage of the special procedures under the FSIA for service of process upon and obtaining personal jurisdiction over a foreign state, while ignoring its rules of immunity and limitations on jurisdiction.

to preempt" that "Federal law" insofar as determinations of immunity are concerned. See pages 23-24 *infra*. This preemptive intent is also reflected in statements that the purpose of the FSIA was to "codify" what Congress deemed to be the proper principles of foreign sovereign immunity (H.R. Rep. 94-1487, at 7; S. Rep. 94-1310, at 7; *1973 Hearing* 32-33, 39), with the understanding that Congress itself would carve out any additional exceptions that might be indicated by future developments in international law and the practice of other nations (*id.* at 32). Similar points were stressed throughout the legislative history.[13]

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[13] See S. Rep. 94-1310, at 1 (the FSIA "define[s] the jurisdiction of United States courts in suits against foreign states, [and] the circumstances in which foreign states are immune from suit"); *id.* at 8 (the purpose of the FSIA "is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity"); *ibid.* (prior to enactment of the FSIA, there were no "comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state" and no "firm standards as to when a foreign state may validly assert the defense of sovereign immunity"); *id.* at 12 (the FSIA "set[s] forth comprehensive rules governing sovereign immunity" and "prescribes * * * the jurisdiction of U.S. district courts in cases involving foreign states"); *id.* at 14 (the FSIA "sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states"). Accord H.R. Rep. 94-1487, at 1, 6, 7, 14. See also *1976 Hearings* 58 (statement by a representative of the American Bar Association's International Law Section) ("The bill defines comprehensively the criteria that American courts will apply in determining when a foreign state is subject to suit.").

A passsage in the section-by-section analysis submitted with the bill in 1973 stated that the proposed 28 U.S.C. 1330 was not intended to supplant specialized jurisdictional regimes, such as those established by 28 U.S.C. 1333, dealing with admiralty, maritime and prize cases, and by 28 U.S.C. 1338, dealing with patent and copyright cases. *1973 Hearing* 47; 119 Cong. Rec. 2219 (1973). The 1976 House Report, however, states that the prior section-by-section analysis was superseded by the analysis of the 1976 bill (see H.R. Rep. 94-1487, at 12), which does not contain a similar suggestion that jurisdictional regimes outside of 28 U.S.C. 1330 might remain applicable to suits against foreign states (see H.R. Rep. 94-1487, at 12-14). That omission is attributable to the fact that 28 U.S.C. 1605(b), which was not contained in the 1973 version of the bill that was the subject of the superseded section-by-section analysis (see *1973 Hearing* 5-6), provides that a foreign state is not immune from an in personam suit in admiralty to enforce a maritime lien against a vessel or cargo.

b. Moreover, the legislative history shows that when Congress enacted the FSIA, it specifically addressed the question of what torts should subject a foreign state to the jurisdiction of the United States courts and chose *not* to exempt from immunity those acts or omissions that occur outside the United States. See pages 11-12, *supra*. In addition, the legislative history confirms Congress's understanding that the FSIA was intended to codify the restrictive theory of sovereign immunity, under which "the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)" (H.R. Rep. 94-1487, at 7; S. Rep. 94-1310, at 9; see also 122 Cong. Rec. 33532 (1976) (remarks of Rep. Danielson)). In other words, the rule of immunity was intended to apply, in general terms, "to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform" (H.R. Rep. 94-1487, at 14; S. Rep. 94-1310, at 14) and therefore "are governed by private law" (*1976 Hearings* 30).[14] Although there may be some question as to how the "public act"/"private act" distinction identified in the legislative history applies in the specific context of tort claims, it is consistent with the general thrust of that distinction that Congress's principal purpose in fashioning the tort exception in 28 U.S.C. 1605(a)(5) was to lift a foreign sovereign's immunity with respect to injuries caused by traffic accidents and similar acts in the United States (H.R. Rep. 94-1487, at 9, 20-21; S. Rep. 94-1310, at 10, 20-21; *1976 Hearings* 27, 58; *1973 Hearing* 42). Such conduct is the sort in which private persons engage and for which they may be sued under domestic tort law.

This provision was intended to replace the prior practice of proceeding in rem in admiralty suits involving a foreign state by arresting or attaching its vessel or cargo. See 28 U.S.C. 1609; H.R. Rep. 94-1487, at 21-22; S. Rep. 94-1310, at 21-22; *1976 Hearings* 74-75, 97-98; *Castillo* v. *Shipping Corp. of India*, 606 F. Supp. 497, 502-503 (S.D.N.Y. 1985); *China Nat'l Chem. Import & Export Corp.* v. *M/V Lago Hualaihue*, 504 F. Supp. 684, 689-690 & n.1 (D. Md. 1981). The legislative history states that a plaintiff may also bring an admiralty claim under Section 1605(a) (H.R. Rep. 94-1487, at 21-22; S. Rep. 94-1310, at 21-22). Although the FSIA does not contain a comparable provision specifically addressing patent, copyright and trademark suits, such suits may be considered under the commercial activity exceptions in 28 U.S.C. 1605(a), where applicable. See Morris, *Sovereign Immunity: The Exception for Intellectual or Industrial Property*, 19 Vand. J. Transnat'l L. 83, 94 (1986).

[14] See also *1976 Hearings* 24 (statement of Legal Adviser Leigh) (the FSIA assures that American citizens "are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would"); see also *id.* at 31, 36 (remarks of Bruno Ristau) ("private-law activities"); *id.* at 31 ("private-law dispute").

By contrast, there is no suggestion whatever in the legislative history that the tort exception in 28 U.S.C. 1605(a)(5) was intended to subject a foreign state to the jurisdiction of United States courts for injuries allegedly sustained as a result of an armed attack by its military forces outside the United States in time of war.[15] That is not conduct "which private persons normally perform" (H.R. Rep. 94-1487, at 14; S. Rep. 94-1310, at 14) or that is addressed by the domestic tort law of the United States governing private conduct; it is, rather, governed by customary international law and conventions that specifically address the actions of sovereign states in time of war. See notes 4, *supra*, and 27, *infra*. See also 28 U.S.C. 1606 ("the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"); *Feres* v. *United States*, 340 U.S. 135, 141-142 (1950); *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), slip op. 9-10.

Moreover, when the FSIA was passed, acts of a nation's armed forces were regarded as classic examples of what were termed sovereign or "public acts," for which one nation was entitled to immunity in the courts of another nation, as the Second Circuit itself previously recognized in *Victory Transport, Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (1964), cert. denied, 381 U.S. 934 (1965). In fact, during the 1976 Hearings, a representative of the maritime bar observed that "acts concerning the Armed Forces" would not fall within the exceptions to the general rule of immunity under

[15] This case of course does not present any occasion to consider the extent, if any, of a foreign state's immunity for intentional or negligent acts or omissions by its military forces committed in the United States, in either a combatant or noncombatant role.

the FSIA (*1976 Hearings* 95, citing *Victory Transport*).[16] It therefore is especially implausible to suppose that Congress intended the tort exception in 28 U.S.C. 1605(a)(5) to abrogate a foreign state's immunity from the jurisdiction of United States courts in a suit seeking damages for a military attack on a ship on the high seas in time of war.[17] The court of appeals' holding that respondents nevertheless may prosecute such suits under the Alien Tort Statute therefore is utterly incompatible with the balance Congress struck in the FSIA.[18]

2. Consistent with the text and legislative history of the FSIA, this Court made clear in *Verlinden* that the FSIA "contains a comprehensive set of legal standards governing claims of

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[16] See also *1976 Hearings* 93 (until mid-century, United States courts applied the absolute rule of immunity "to shield foreign sovereigns from liability not only for public acts, such as the navigation of warships, but also for commercial activities, such as the operation of state-owned merchant vessels"); *id.* at 95-96 (emphasis added) (the FSIA "removes the defense for most tort suits arising here, which would include among other cases, automobile accidents involving diplomatic personnel and collisions involving State-owned merchant vessels or even foreign warships *in U.S. territorial waters*").

[17] The sensitivity of military affairs in the context of foreign sovereign immunity is reflected in 28 U.S.C. 1611(b)(2), which preserves a foreign state's immunity from attachment or execution even of property in the United States, if the property is "of a military character" or "under the control of a military authority or defense agency," and if it "is, or is intended to be, used in connection with a military activity." This immunity is firmly rooted in international law (*The Schooner Exchange*, 11 U.S. (7 Cranch) at 144; *United States* v. *Thierichens*, 243 F. 419, 420-421 (E.D. Pa. 1917); Geneva Convention on the High Seas, Art. 8, 13 U.S.T. 2315; 1 L. Oppenheim, *International Law* § 450 (1955); Delupis, *Foreign Warships and Immunity for Espionage*, 78 Am. J. Int'l L. 53, 56-57, 74-75 (1984)), and it was included in the FSIA to "avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act" (H.R. Rep. 94-1487, at 31; S. Rep. 94-1310, at 31).

[18] This conclusion is supported by a brief exchange during the hearings regarding the *Mayaguez* incident, which involved the seizure by Cambodian forces of an American merchant vessel (see U.S. Dep't of State, *Digest of United States Practice in International Law* 777-782 (1975)). Representative Jordan inquired whether that incident would have been affected by the FSIA if it had been in effect. Legal Adviser Leigh responded that "there's nothing in this bill which would have been applicable to that situation – nothing" (*1976 Hearings* 53-54).

immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities" (461 U.S. at 488), and that "if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States" (*id.* at 497). The Court explained (*id.* at 493-494 (emphasis added; footnote omitted)):

> The [FSIA] must be applied by the district courts in *every action* against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a). At the threshold of *every action* in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies – and in doing so it must apply the detailed federal law standards set forth in the Act.

This understanding of the statutory scheme pervades the opinion in *Verlinden*.[19] See also *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983). The court of appeals' conclusion that respondents may sue petitioner under the Alien Tort Statute without regard to rules of immunity and limitations on subject matter jurisdiction in the FSIA therefore cannot be reconciled with *Verlinden*.

The other courts of appeals likewise have taken the position that the FSIA contains the exclusive standards for resolving claims of sovereign immunity by foreign states.[20] In fact, as the

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[19] See 461 U.S. at 489 ("if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction"); *id.* at 493 (the FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States"); *id.* at 495 n.22 (quoting H.R. Rep. 94-1487, at 12 ("the Act's purpose is to set forth 'comprehensive rules governing sovereign immunity' ")); *id.* at 496 (same); *ibid.* ("the jurisdictional provisions of the Act are simply one part of this comprehensive scheme"); *id.* at 496-497 ("The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state.").

[20] See, *e.g.*, *MacArthur Area Citizens Ass'n*, 809 F.2d at 919; *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986), cert. denied, No. 86-909 (Mar. 9, 1987); *City of Englewood* v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 35 (3d Cir. 1985); *Yugoexport, Inc.* v. *Thai*

panel below acknowledged (Pet. App. 11a), the Second Circuit had adhered to that view prior to its decision in this case. See, *e.g.*, *O'Connell Machinery Co.* v. *M.V. "Americana"*, 734 F.2d at 116. Similarly, other courts of appeals have held that the jurisdictional provisions in 28 U.S.C. 1330(a) are exclusive and cannot be circumvented by resort to other jurisdictional provisions, such as the federal-question and diversity statutes, 28 U.S.C. 1331 and 1332.[21] In particular, the District of Columbia Circuit held in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985), that the FSIA barred the district court from exercising jurisdiction over a tort suit against a foreign sovereign based on conduct that occurred outside the United States, even though the plaintiffs invoked the district court's jurisdiction under the Alien Tort Statute. See 726 F.2d at 776 n.1 (Edwards, J., concurring); *id.* at 805 n.13 (Bork, J., concurring). See also *In re Korean Air Lines Disaster of Sept. 1, 1983*, No. 83-0345 (D.D.C. Aug. 2, 1985), slip op. 10-11; *Siderman* v. *Republic of Argentina*, No. CV 82-1772-RMT (C.D. Cal. Mar. 7, 1985).

C. THE COURT OF APPEALS' RATIONALE FOR CIRCUMVENTING PETITIONER'S IMMUNITY FROM THE JURISDICTION OF UNITED STATES COURTS UNDER THE FSIA IS WITHOUT MERIT

The court of appeals acknowledged that the legislative history of the FSIA, this Court's decision in *Verlinden*, and its own prior decision in *O'Connell* all support the view that the FSIA is "the sole basis for United States jurisdiction over foreign sovereigns" (Pet. App. 11a). The court concluded, however,

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Airways Int'l, Ltd., 749 F.2d 1373, 1375 (9th Cir. 1984), cert. denied, 471 U.S. 1101 (1985); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985).

[21] *Goar* v. *Compania Peruana de Vapores*, 688 F.2d 417, 420-422 (5th Cir. 1982); *REX* v. *CIA. Pervana de Vapores, S.A.*, 660 F.2d 61, 64-65 (3d Cir. 1981), cert. denied, 456 U.S. 926 (1982); *Williams* v. *Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981), cert. denied, 455 U.S. 982 (1982); *Ruggiero* v. *Compania Peruana de Vapores*, 639 F.2d 872, 875-876 (2d Cir. 1981); see also *Joseph* v. *Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987).

that because the FSIA provides exceptions to sovereign immunity primarily for commercial disputes, "Congress was not focusing on violations of international law when it enacted the FSIA" (*ibid.*) and that the FSIA therefore should not be construed to bar what the court viewed as "existing remedies" under the Alien Tort Statute based on alleged violations of international law (*ibid.*). Indeed, the court believed that to construe the FSIA to bar such suits would conflict with international law (*id.* at 10a). This reasoning is wrong in every respect.

1. It is irrelevant for present purposes whether an alien might have been permitted to bring an action against a foreign state under the Alien Tort Statute *prior* to 1976, based on the actions of its military forces outside the United States in time of war. For even if there once was a plausible basis for such a suit – which there was not (see pages 25-27, *infra*) – the text and legislative history of the FSIA make clear that ever *since* 1976, the FSIA has been the exclusive basis for exercising jurisdiction over (and for determining the immunity of) foreign states. See 28 U.S.C. 1602 (emphasis added) ("Claims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles of this chapter."). Compare *Block* v. *North Dakota*, 461 U.S. 273, 284-285 (1983); *United States* v. *Mottaz*, 476 U.S. 834, 846-847 (1986).

2. The court of appeals sought to avoid this jurisdictional preclusion by resorting to the premise that Congress, in enacting the FSIA, did not focus on acts by a foreign state that violate international law, and that the FSIA therefore should be construed to permit suits seeking redress for such acts under other jurisdictional regimes (Pet. App. 11a). Even if the court of appeals' view of Congress's focus were correct, the lack of specific discussion of one subpart of a subject in the legislative history is no basis for excluding that subpart from the coverage of a statute that is both written and described in its legislative history in all-embracing terms. *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983); *GTE Sylvania*, 447 U.S. at 110-111. But in fact, the court of appeals was wrong in believing that Congress did not have violations of international law in mind when it enacted the

FSIA. The FSIA contains an express exception to the rule of foreign sovereign immunity where the suit involves rights in property that were taken "in violation of international law" (28 U.S.C. 1605(a)(3)). This provision for certain suits based on violations of international law indicates that other such suits that are not expressly permitted are barred. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

Moreover, the Alien Tort Statute, which respondents invoke, vests the district courts with jurisdiction over actions brought by an alien for a tort committed in violation of the "law of nations" or a treaty of the United States. As this Court observed in *Verlinden* (461 U.S. at 493 n.19), however, when Congress enacted the FSIA, it relied in part on its power under the Constitution to define offenses against the "Law of Nations" (Art. I, § 8, Cl. 10). See H.R. Rep. 94-1487, at 12; S. Rep. 94-1310, at 12. The comprehensive statutory scheme under the FSIA therefore applies in full force to all suits brought against a foreign state alleging a violation of the "law of nations" and necessarily forecloses the fashioning of different jurisdictional and immunity rules in a suit for a violation of the "law of nations" under 28 U.S.C. 1350.

3. The court of appeals also was wrong in believing that the FSIA must be construed to permit this suit under the Alien Tort Statute in order to avoid placing the United States out of step with prevailing principles of international law. The limitation of the tort exception in 28 U.S.C. 1605(a)(5) to suits based on acts or omissions occurring within the territorial jurisdiction of the United States was consistent with international law and practice when it was enacted (see note 9, *supra*), and it remains so today. See U.N. Gen. Assembly, *Report of the International Law Commission on the Work of its Thirty-Sixth Working Session* 155-158 (1984); U.N. Leg. Series, *Materials on Jurisdictional Immunities of States and Their Property* 8, 30, 37, 43, 159 (1982); *McKeel* v. *Islamic Republic of Iran*, 722 F.2d at 588. That limitation is designed to minimize unnecessary friction between nations by permitting a foreign state to be sued in the forum state only in those circumstances in which it would be liable under the *lex loci delicti commissi*, and thereby confining the application of the forum state's substantive rules of conduct

to matters occurring within its territorial jurisdiction.[22] Thus, it is the decision of the court of appeals, not the statutory standards of immunity under the FSIA, that is out of step with principles of international law.[23]

4. In any event, the court of appeals was seriously mistaken in its basic premise that the Alien Tort Statute furnished "existing remedies" against a foreign state in 1976 for conduct such as that at issue here, and that Congress therefore must have

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[22] The *Report* cited in the text discusses Article 14 of a draft convention on the immunity of states, which provides that a state may not invoke immunity from the jurisdiction of the forum State with respect to proceedings relating to compensation for death or injury to the person or damage to or loss of tangible property "if the act or omission * * * occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in the territory at the time of the act or omission." *Report* at 155. The Commentary explains that "[t]he basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality" (*Report* at 158), and it sets forth some of the practical considerations supporting the exception as so limited: (i) "[s]ince the act or omission has occurred in the territory of the State of the forum, the applicable law is clearly the *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed"; (ii) "[t]he injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity"; and (iii) "the physical injury to the person or the damage to tangible property * * * appears to be confined principally to insurable risks," and the rule of nonimmunity therefore "will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals" (*Report* at 156). Significantly, moreover, the commentary explains that as a result of the requirement that the author of the act or omission have been present in the forum State, "cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of armed conflict, which constitute clear violations of the territory of a neighboring State under public international law, are excluded from the areas covered by article 14" (*Report* at 157).

[23] The extent to which the court of appeals departed from established principles of sovereign immunity is further underscored by the fact that the United States would be immune from suit in its own courts based on conduct such as that alleged here, because the Federal Tort Claims Act bars a suit based on "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" (28 U.S.C. 2680(j)). It is implausible to suppose that Congress nevertheless intended to subject a foreign nation to suit in the courts of the United States based on identical conduct. See also 10 U.S.C. 2734(a) and (b)(3).

meant to preserve those remedies when it enacted the FSIA. The court of appeals pointed to no evidence that the Alien Tort Statute was intended to abrogate the sovereign immunity of a foreign state.[24] As the district court pointed out (Pet. App. 32a), that Statute makes no mention of a foreign state as a possible defendant. Moreover, the First Congress, which enacted the Alien Tort Statute in 1789, clearly would not have contemplated that a foreign state would be subject to suit under that Statute, because the prevailing view of international law at the time, as reflected in this Court's decision in *The Schooner Exchange*, was that a foreign state was absolutely immune from the jurisdiction of the courts of another state.

Indeed, until 1952, the United States continued to take the position that a foreign state was entitled to immunity from all suits in the courts of another state without its consent. *Verlinden*, 461 U.S. at 486-487. Even after 1952, when the United States adopted the view that a foreign state could be sued for acts of a commercial or private nature, the Executive Branch continued to take the position that a foreign state was, under all circumstances, entitled to immunity for its sovereign or public acts (*id.* at 487)—which, as noted above, unquestionably included the use of armed force on the high seas in time of war. See pages 19-20, *supra*. In light of this practice, it is not surprising that the court of appeals did not cite a single case decided prior to the enactment of the FSIA in which a court of the United States exercised jurisdiction under the Alien Tort Statute (or any other jurisdictional provision) over a suit against a foreign state based on the commission of a public or sovereign act that allegedly violated international law. Nor are we are aware of any such case.[25] See Kirgis, *Alien Tort Claims,*

[24] Cf. *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (both holding that the Alien Tort Statute does not waive the sovereign immunity of the *United States* to a suit by an alien).

[25] Aside from the decision in this case, the only other case in which jurisdiction was exercised over a foreign state under the Alien Tort Statute was decided long after the FSIA was enacted. *Von Dardel* v. *Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C 1985). However, the district court's reliance on the Alien Tort Statute was an alternative holding made in the context of a default judgment, and the court did not address the question whether the exclusive jurisdictional and immunity provisions of the FSIA foreclosed the exercise of jurisdiction under the Alien Tort Statute.

Sovereign Immunity and International Law, 82 Am. J. Int'l L. 323, 325 n.7, 326 (1988); *I Congreso del Partido*, [1981] 2 All E. R. 1064, 1078. There accordingly is no basis for attributing to Congress a supposed intention to preserve such "existing remedies" under the Alien Tort Statute when it enacted the FSIA. Compare *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-382 (1982).[26]

[26] Quite aside from the unique bar of sovereign immunity where a foreign state is the defendant, there is some reason to doubt that the First Congress conceived of the Alien Tort Statute as authorizing the courts of the United States to recognize and entertain a cause of action by an alien against *any* defendant based on a violation of the law of nations that was committed outside the United States by persons who have no nexus to the United States or its nationals. Compare *Lauritzen* v. *Larsen*, 345 U.S. 571, 577-579, 592-593 (1953). Rather, Congress appears to have been primarily concerned with affording a forum for those seeking redress for violations of the law of nations for which the United States might, as a practical matter, be held accountable, and which therefore might involve the United States in an international controversy if redress was not afforded. Such violations would principally include those committed in the United States (*e.g.*, the celebrated incident of an assault on the French Minister, discussed in *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Term. 1784); compare 18 U.S.C. 112), and, perhaps, certain violations committed outside the United States but by persons subject to its jurisdiction. Under this construction, however, an assault by a British citizen on the French Minister in Great Britian (or an attack on the high seas by the military forces of one foreign nation upon a ship registered under the laws of another foreign nation), while perhaps a violation of the "law of nations" in a general sense, would not give rise to a cause of action cognizable in the courts of the United States under the Alien Tort Statute, because the incident would not normally be subject to the laws of the United States and would not give rise to any international responsibility on the part of the United States.

This interpretation of the Alien Tort Statute finds support in the origins of the constitutional provision that confers on Congress the power to "define and punish Offences against the Law of Nations" (Art. I, § 8, Cl. 10). This provision was adopted in response to the lack of power by the Continental Congress to punish offenses against the law of nations, and thereby to prevent incidents involving the States or their people from embroiling this Nation with foreign nations. See *Tel-Oren*, 726 F.2d at 783-784 (Edwards, J., concurring); *The Federalist* No. 3 (Jay), at 43-44 (Rossiter ed. 1961); *id.* No. 42 (Madison), at 265; cf. *id.* No. 80 (Hamilton), at 476; *Boos* v. *Barry*, No. 86-803 (Mar. 22,

5. The decision of the court of appeals could have a substantial adverse impact on the foreign relations of the United States. The United States does not condone violations of international law, and the United States takes the position that petitioner Argentine Republic should take responsibility for any such violations that it committed in its territory or on the high seas during the war with Great Britain. But sensitive foreign policy concerns are implicated by the court of appeals' holding that the courts of the United States may assume responsibility for determining whether such a violation occurred and for awarding damages against petitioner if they find a violation.[27]

1988), slip op. 9. This interpretation also is supported by the text of 28 U.S.C. 1350 itself, which confers jurisdiction over suits based on a tort "committed in violation of * * * a treaty *of* the United States" (emphasis added). The quoted language suggests that a suit will lie only where there is an alleged violation of an international obligation undertaken by the United States. See Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 Vand. J. Transnat'l L. 47, 54-55 (1988).

Moreover, because the Alien Tort Statute (like the federal-question statute) is only jurisdictional in nature, it does not create a cause of action. In the absence of an Act of Congress that extends the substantive law of the United States to wrongs committed by one alien against another outside the United States and creates a private cause of action for a violation, a court would be required to "imply" a cause of action under whatever general principles of international law it believed should govern that conduct. Such an approach would present sensitive questions of foreign relations and the proper role of Article III courts (see *Tel-Oren*, 726 F.2d at 801-808 (Bork, J. concurring))—especially where, as here, the defendant is a foreign state. The Second Circuit took a far broader view of the Alien Tort Statute in *Filartiga*, upon which that court relied in this case (Pet. App. 8a-9a). However, whatever the soundness of *Filartiga* (see U.S. Amicus Br. 13-14 n.11 (pet. stage)), that case was decided in 1980; it therefore could have given Congress no reason to believe, when it passed the FSIA in 1976, that an alien could even sue an individual defendant (much less a foreign state) under that Statute based on conduct occurring outside the United States and having no nexus to this country or its nationals.

[27] The difficulties are illustrated by this case. Substantive principles regarding the use of military force against civilians in time of war are governed by such instruments as the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907 (the Hague Convention IV) (36 Stat. 2277); the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 (6 U.S.T. 1949); and the Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22,

The decision below not only has the extraordinary effect of requiring petitioner to answer to the courts of a neutral third party regarding its conduct during a time of war. It also threatens to turn the courts of the United States into tribunals in which aliens generally (but not United States citizens) may seek redress against foreign governments for conduct that has no substantial nexus to the United States. As this Court observed in *Verlinden*, "Congress was aware of the concern that 'our courts [might be] turned into small "international courts of claims[,]" . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.' " 461 U.S. at 490, quoting *1976 Hearings* 31. And as this Court further observed, "Congress protected against that danger * * * by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. 1605" (461 U.S. at 490). The court of appeals failed to respect those substantive limitations here. In addition, because the decision below creates jurisdiction where none was intended by Congress when it enacted the FSIA, it may cause foreign states to take reciprocal measures by opening their courts to suits against the United States alleging violations of "international law" occurring anywhere in the world. Compare *Boos* v. *Barry*, slip op. 10-11.[28] These consequences will be avoided if

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1930 (London Nov. 6, 1936) (*Documents on the Laws of War* 147-150, 153-155 (1982)). Although Article 3 of the Hague Convention provides that a belligerent party that violates regulations concerning the conduct of war "shall, if the case demands, be liable to pay compensation" (36 Stat. 2290), that provision and the Geneva Convention have been held not to be self-executing and therefore not to give rise to a private right of action against individual defendants. *Huynh Thi Anh* v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978); *Dreyfus* v. *Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), cert. denied, 429 U.S. 835 (1976); *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring); *Handel* v. *Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985). *A fortiori*, those instruments would not give rise to a private right of action against a state party, especially in a foreign forum. The court of appeals' recognition of an identical cause of action under the Alien Tort Statute allows an alien (but not a United States citizen) to circumvent this limitation.

[28] See *Foreign Sovereign Immunities Act: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 17, 19, 30-31, 41, 51 (1987); note 17, *supra*.

the Court interprets the FSIA in the manner required by its text and legislative history.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to affirm the judgment of the district court dismissing respondents' suits for lack of subject matter and personal jurisdiction.

Respectfully submitted.

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